Supreme Court, U.S.
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No. 10-684

IN THE
Supreme Court of the United States

HARRIET BELL, individually and on behalf on all similarly situated persons,

Petitioner,

v.

CALLAWAY PARTNERS, LLC, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where Respondent Callaway's bonus policy is expressly permitted by United States Department of Labor Regulations and there is no split in the circuits.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Callaway Partners, LLC and Huron Consulting Group, Inc.* disclose the following entities:

CP4 Warbird Holdings, LLC – Successor to Callaway Partners, LLC

Huron Consulting Group Holdings LLC – Affiliate of Huron Consulting Group, Inc.

Huron Consulting Services LLC – Affiliate of Huron Consulting Group, Inc.

Huron Demand LLC – Affiliate of Huron Consulting Group, Inc.

Wellspring Management Services LLC – Affiliate of Huron Consulting Group, Inc.

*Huron Consulting Group, Inc. purchased Callaway after the events at issue and was added as a defendant under a successorship theory. It joins in all arguments of Callaway.

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INTRODUCTION

Petitioner has presented no "compelling reasons" to grant the Petition for Certiorari ("Petition"). There is no split in the circuits, and the Eleventh Circuit's decision did not create one.

The United States Department of Labor's ("DOL") regulations and opinion letters, as well as case law, all show that Respondent Callaway's bonus plan was entirely consistent with the DOL's salary basis test, and, therefore, Petitioners were exempt from the Fair Labor Standards Act's ("FLSA") overtime requirements. The regulations specifically state that additional compensation for hours worked beyond the normal workweek can be paid "on any basis," including a straight-time hourly basis, without affecting the exemption. 29 C.F.R. § 541.604(a). The limits on deductions from salary do not prohibit deductions from additional compensation and do not prohibit calculating such additional compensation by the hour rather than by the day. Callaway's bonus system is thus permissible "additional compensation" consistent with the salary basis test.

STATEMENT OF THE CASE

Respondent Callaway Partners, LLC ("Callaway"), an accounting professional services firm, was engaged by HealthSouth Corporation to perform accounting work on its financial restatement. (*Id.* R-341-8 p. 2 ¶¶ 3, 5-7.) Petitioner and the opt-in Petitioners (collectively, "Petitioners") are highly educated accountants and Certified Public Accountants who performed accounting services on the HealthSouth restatement. (*Id.* ¶¶ 8, 9;

R-115-1.) During their employment with Callaway, Petitioners often made in excess of $100,000 per year. (*See id.* p. 3, ¶ 17; R-96-2 ¶ 23.) Callaway classified Petitioners as exempt from the FLSA's overtime requirements. (R-341-8, p. 3, ¶ 12.)

A. The First Component of Petitioners' Pay: A Predetermined Weekly Salary

Petitioners' pay consisted of two independent components. (*Id.* ¶ 13.) First, Petitioners received a predetermined weekly amount in excess of $455 for all hours worked. (*Id.* ¶ 14.) The engagement letters provided to the Petitioners stated they would be paid a weekly salary. (*Id.* ¶ 16.) For example, Petitioner Bell's engagement letter stated: "Your weekly salary will be $1600 per week . . ." and "Your salary will be paid each Friday for the previous week." (*Id.* ¶ 18.)

Callaway also provided a PowerPoint presentation to Petitioners and others on the HealthSouth Project. Page 4 of the PowerPoint states that "[e]very employee assigned on the HealthSouth engagement is paid a guaranteed **weekly salary**." (emphasis in original). (*Id.* p. 4, ¶ 21.) Tracking the DOL's "salary basis" regulations under the FLSA (29 C.F.R. § 541.602), the PowerPoint states:

> For each week you are employed by Callaway, working on the HealthSouth engagement, you are entitled to your full weekly salary, subject to a few exceptions, listed below:
>
> > "Days" not worked for personal reasons, unpaid vacation, or illness (can be offset by PTO days earned)

* * *

(*Id.* pp. 4-5, ¶ 23.) The PowerPoint provided an example:

> A project professional takes 2 personal days and works 3 days, is paid 3/5 of their weekly salary, and reports 35 billable hours. This project professional's normal weekly salary is $1,000, $600 paid for this week after $400 deduction for 2 full day absences for personal reasons.

(R-341-15 p. 11.)

Thus, a consultant's salary would be subject to a deduction of one-fifth of the weekly salary if he or she took a full day off from work for personal reasons during the normal workweek without substituting Paid Time Off ("PTO"). (R-341-8 ¶ 24.)

Callaway did not pay Petitioners "by the hour," but rather paid Petitioners a predetermined weekly salary of $1600 or more, as "all or part" of their compensation. (*See* R-339-6 through 339-10.) This salary did not depend on the quality or quantity of work performed. (*See* R-341-8 p. 3, ¶ 15; 341-16.) Indeed, there were at least 67 weeks in which a Plaintiff averaged less than 8 hours of work per day, but still received his or her full pro-rata salary. (*See* R-339-14.) In addition, there were countless days on which Petitioners worked less than a full day but received their full pro-rata salary for that day. (R-341-8 p. 6, ¶¶ 25-26.) For example, Petitioners regularly worked only a part day on Fridays and then left early to commute home from Birmingham to the Atlanta area, but they received their full pro-rata salary for those days. (*Id.* p. 6, ¶ 26.)

B. The Second Component of Petitioners' Pay: The Bonus

The second component of Petitioners' pay was a bonus, which was additional compensation beyond Petitioners' predetermined weekly amount. (R-341-8, ¶ 35.) Callaway offered Petitioners a bonus because it wanted to provide incentive for Petitioners to work hard. (*Id.* ¶ 36.)

The engagement letters stated that Petitioners would be eligible for a bonus. (*Id.* ¶ 19.) The PowerPoint presentation explained the bonus in detail:

> For each week you are employed by Callaway, receiving a weekly salary while working on the HealthSouth engagement, you will earn a bonus for billable hours worked in excess of 40 hours. . . . Any deficit created in a given week (where billable hours are less than 40), will be carried forward and applied against future week's [sic] bonus calculation. This calculation has *no effect* on an employee's guaranteed weekly salary.

(*Id.* ¶ 39 (emphasis in original).) Beginning in early 2005, Callaway modified the plan and paid a bonus to Petitioners even when they worked fewer than five days during the normal week, as long as the total hours for the week averaged more than eight hours per day for the days worked in the normal workweek. (*Id.* ¶ 37.)

The PowerPoint illustrated how the bonus was calculated:

Bonus Example #1

A project professional works a full week, is paid their full weekly salary, and reports 55 billable hours. This project professional's weekly salary is $1,000 and is in good standing with Callaway. There is no "bonus hour deficit" from the previous week.

Billable Hours	55
Weekly Billable Hour Bonus Threshold	(40)
Bonus Hours Earned	15
Deficit from previous week	(0)
Weekly Bonus Hours	15
x effective hourly rate	$25.00
Weekly Bonus Amount	$375.00

Bonus Example #2

A project professional works a full week, is paid their full weekly salary, and reports 35 billable hours. This project professional's weekly salary is $1,000 and is in good standing with Callaway. There is no "bonus hour deficit" from the previous week.

Billable Hours	35
Weekly Billable Hour Bonus Threshold	(40)
Bonus Hours Earned	(5)
Deficit from previous week	(0)
Weekly Bonus Hours	(5) To be carried over to next week
x effective hourly rate	$25.00
Weekly Bonus Amount	$0

Bonus Example #2a

The next week, the same project professional works a full week, is paid their full weekly salary, and reports 60 billable hours. This project professional's weekly salary is $1,000 and is in good standing with Callaway.

Billable Hours	60
Weekly Billable Hour Bonus Threshold	(40)
Bonus Hours Earned	(20)
Deficit from previous week	(5)
Weekly Bonus Hours	(15)
x effective hourly rate	$25.00
Weekly Bonus Amount	$375

(R-341-15 pp. 8-11.)

Callaway's bonuses were paid in a straight-time hourly amount. (R-341-8.) Specifically, Callaway divided each Plaintiff's salary by forty (derived from the five-day work week) to determine the straight-time hourly bonus rate. (*Id.*) If a Plaintiff's weekly salary was $1,600, her bonus hour rate was $40.00 per hour ($1,600 ÷ 40 hours = $40.00).

The calculation of whether an employee earned bonus plan and any related deductions to the bonus had no effect whatsoever on the payment of the predetermined weekly salary. (*Id.* ¶ 40.) If a Plaintiff worked seven and not eight hours on each regularly scheduled workday, thus totaling 35 hours of work, he or she still earned the full predetermined weekly salary. (*Id.* ¶ 41.) Moreover, there is no evidence that Callaway ever required Petitioners to "pay back" any deficit in

hours billed under 40 in a week. The Plaintiff (in the foregoing example) simply would not earn a bonus until he or she made up the bonus-hour deficit of five hours and then worked over 40 hours in a week. (*Id.* ¶ 42.)

After two and a half years of discovery, Petitioners identified only 54 instances out of a collective 7,871 weeks worked in which they claim Callaway allegedly "deducted" from their bonuses because they had worked an insufficient number of hours in a previous week. Petitioners offered no evidence that in these 54 instances, or at any other time, that Callaway made any impermissible deduction from their predetermined weekly amounts (i.e., the salary). Callaway paid Petitioners their full weekly or pro-rata salaries in each instance. (*See* R-341-16.)

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit Correctly Held that Callaway's Bonus System Complied with the DOL's Regulations and There is No Split in The Circuits

A. The Appropriate Legal Framework

The FLSA requires that employees be paid overtime when they work more than forty hours in a week, unless an employee is "exempt." 29 U.S.C. § 207(a)(1). The Secretary of Labor has issued regulations providing that employees are exempt if (1) they are paid a "predetermined" weekly amount of at least $455 and (2) perform the types of job duties set forth in the regulations for the exemptions. *See* 29 C.F.R. § 541.602

(salary basis) and §§ 541.100 through 541.300 (executive, administrative and professional exemptions). These two requirements are commonly referred to as the "salary basis" test and the "duties" test. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004). Only the salary basis test is at issue here. (R-291.)

The FLSA says nothing about the salary basis test; rather, the test was created by the Secretary of Labor. As the Supreme Court has explained, "Because the salary-basis test is a creature of the Secretary [of Labor]'s own regulations, his interpretation of it is, under [Supreme Court] jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

B. Callaway Did Not Improperly Deduct From Salary

Petitioners failed to present evidence that Callaway had a regular practice of improperly deducting from their salary. Rather, Petitioners identified only 54 out of a total of 7,871 weeks in which they allege that Callaway improperly "deducted" from their bonuses.[1] Pursuant to its bonus pay practice, Callaway factored in a "bonus hour deficit" in calculating the employee's bonus pay (but not salary) in the subsequent week or

1. In the District Court, Petitioners initially argued that Callaway's bonus system was a "subterfuge" for violating the salary basis test. (R-351 p. 3.) Apparently in light of the fact that they eventually only challenged 54 out of 7,871 instances, Petitioners failed to present argument on this issue on appeal and therefore it was abandoned.

weeks. Callaway's bonus pay practice was in compliance with the DOL's regulations and did not violate the salary basis test.

C. The Payment of "Additional Compensation" on a Straight-Time Hourly Basis Does Not Violate the Salary Basis Test

The DOL regulations require that exempt employees "regularly receive[] . . . a predetermined amount constituting all or part of" their compensation" which exceeds $455 each week. 29 C.F.R. § 541.602(a). The regulations *permit* – but do not require – employers to pay additional compensation to exempt employees on any basis, including a straight-time hourly bonus:

> An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. . . . *[T]he exemption is not lost if an exempt employee who is guaranteed at least $ 455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.*

29 C.F.R. § 541.604(a) (emphasis added).

The Eleventh Circuit has held that additional compensation can be paid to an exempt employee "as long as there is a non-deductible minimum" salary. *Hogan*, 361 F.3d at 625. Other courts have further held that additional compensation may be paid on a straight-time hourly basis without destroying an employee's exempt status. *See, e.g.*, *ACS v. Detroit Edison Co.*, 444 F.3d 763, 768 (6th Cir. 2006) ("'straight-time' overtime compensation" to exempt employees does not violate the salary-basis test).

Consistent with § 541.604 and this case law, Callaway paid Petitioners bonuses on a straight-time hourly basis. There is no merit to Petitioners' argument that because Callaway paid them hourly additional compensation in addition to their weekly salaries, they were paid "by the hour," or that their salary therefore was not a salary. The DOL regulation expressly states additional compensation may be calculated in this exact way: by dividing the weekly salary by 40 hours to determine a "straight-time hourly amount," and then paying that amount on an hourly basis for hours over 40, in addition to paying the predetermined weekly salary. Whenever an employer pays a salaried employee who works more than 40 hours in a week his or her weekly salary plus hourly "additional compensation" of 1/40 of the weekly salary for any hours over 40, it is a mathematical tautology that the weekly salary plus the "additional compensation" equals the "straight-time hourly amount" times the total hours worked. An employer does not violate the DOL's salary basis test by doing exactly what that salary basis test expressly authorizes.

D. The DOL, Eleventh Circuit and Other Courts Have All Held That An Employer Is Authorized to Calculate the "Additional Compensation" by Any Method, and Is Not Prohibited from "Deducting" from Exempt Employees' "Additional Compensation"

The DOL regulations plainly recognize two forms of compensation for exempt employees (predetermined weekly salary and additional compensation), but those regulations state that only an "employer who makes improper deductions from *salary*" may lose the exemption. 29 C.F.R. § 541.603(a) (emphasis added). Nothing in the FLSA or the Secretary's regulations prohibited Callaway from "docking" a Plaintiff's bonus eligibility based on hours billed.

The DOL has issued two opinion letters establishing that employers may deduct from exempt employees' bonuses. In a November 3, 2006, Opinion Letter, the DOL stated there is no prohibition against deductions from the managers' bonus for bad checks or other cash shortages.

> Section 541.600(a) requires only that exempt employees be paid a guaranteed salary of at least $455 per week. Additional compensation above this salary amount is generally something that may be agreed upon between the employer and the employee. *The prohibition against improper deductions from the guaranteed salary under 29 C.F.R. § 541.602(b) does not extend to such additional compensation provided to exempt*

> *employees.* Therefore, it is our opinion that bad check and other cash shortage deductions from bonus payments paid to salaried exempt employees are permissible and do not affect the employees' exempt status under section 13(a)(1) of the FLSA so long as the bonus payments are bona fide and are not paid to facilitate otherwise prohibited deductions from the guaranteed salary.

Opinion Letter, FLSA 2006-24NA (Nov. 3, 2006), p. 2 (emphasis added),[2] *see also* Opinion Letter, FLSA 2006-24 (July 6, 2006) (Acting Administrator), p. 2. (R-341-3.) Callaway's bonus plan was consistent with these opinion letters.

Consistent with the Eleventh Circuit's decision, other courts have held that employers are permitted to deduct from exempt employees' bonus payments without violating the salary basis test. In *Lovelady v. Allsup's Convenience Stores, Inc.*, 304 Fed. Appx. 301 (5th Cir. 2008), the plaintiffs (convenience store managers) received a predetermined, weekly salary regardless of the number of hours they worked. *Id.* at 303. The plaintiffs were eligible for bonuses, and reductions to or deductions from those bonuses were permissible under the company's bonus plan. The plaintiffs argued that the "reduction-of-bonus" provisions in the bonus plan constituted "an impermissible docking of pay and

2. DOL opinion letters are entitled to great weight when they interpret the DOL's own regulations. *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1232 n.7 (10th Cir. 2008); *see also Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002); 29 C.F.R. § 790.17(d).

destroy[ed] the exempt status of store managers." The Fifth Circuit rejected this argument. Relying on the DOL's regulations and an opinion letter, the Fifth Circuit held that deductions from the managers' bonuses are permissible under the salary-basis test:

> Deductions or reductions from bonus payments do not affect an employee's status as an exempt employee so long as the requisite minimum $ 455 salary is paid. "An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." "The prohibition against improper deductions from the guaranteed salary under 29 C.F.R. § 541.602(b) does not extend to such additional compensation provided to exempt employees." Therefore, Allsup's' management bonus policy does not result in impermissible deductions that destroy [the plaintiff's] exempt status.

Id. at 304 (footnotes and citations omitted).

In *Phillips v. Capital Toyota, Inc.*, No. 1:05-cv-215, 2006 U.S. Dist. LEXIS 333622 (E.D. Tenn. May 22, 2006), the plaintiff was the parts manager at defendant car dealership. *Id.* at *4. The plaintiff was paid a fixed salary plus bonus compensation. *Id.* at *5. The dealership tracked the plaintiff's hours, and reduced his bonus

because of his hours. *Id.* Like Petitioners in this case, the *Phillips* plaintiff claimed he was not paid on a salary basis because his total compensation could be reduced based on the number of hours he worked. The court rejected the plaintiff's argument. Citing to the DOL regulations, the court concluded: "As these regulations make clear, the key is not whether an employee's overall compensation is subject to reduction, but rather if the predetermined amount is subject to reduction." *Id.* at *13. "Plaintiff's bonus and trip to Hawaii were not part of his predetermined amount of compensation. Therefore, they could be reduced based on the amount of hours Plaintiff worked without changing Plaintiff's status as an exempt employee under the FLSA." *Id.*

In *Coppage v. Bradshaw*, 665 F. Supp. 2d 1361 (N.D. Ga. 2009), the court held that the plaintiff was exempt even though the employer reduced his additional compensation based on negative commissions. The *Coppage* plaintiff was paid a salary of $1,153.85 per pay period; however, the company expected him to earn $2,307.70 per pay period in salary plus commissions. *Id.* at 1366. Under the company's pay practice, if the plaintiff earned less than that amount, the difference was carried forward to the following pay period as a negative commission balance. *Id.* Thus, any additional compensation earned in the following pay period was offset by this negative commission balance. Following the Secretary's regulations, the court held: "[W]here an exempt employee receives additional compensation above his guaranteed minimum salary, an employer may make deductions without destroying the salary basis." *Id.*

E. There Is No Split in the Circuits

The DOL regulations and opinion letters, the Eleventh Circuit's decision, *Lovelady*, *Phillips* and *Coppage* all reach the same conclusion: as long as an employer pays the predetermined amount (i.e., the salary), it can make deductions from employees' additional compensation without destroying the exemption.

The cases on which Petitioners rely, *Martin v. W.E. Monks & Co.*, No. 92-3729, 1993 U.S. App. LEXIS 20610 (6th Cir. Aug. 3, 1993) and *Klein v. Rush-Presbyterians-St. Luke's Med. Center*, 990 F. 2d 279 (7th Cir. 1993), are no longer good law. Those cases only purported to interpret the DOL's *former* salary basis regulation, 29 C.F.R. § 541.118. Unlike the new regulation that Callaway and the Eleventh Circuit relied upon, § 541.604(a), the old regulation did not expressly state that it was consistent with the salary basis test for additional compensation to be paid on an hourly basis. Subsequent to *Klein* and *Martin*, the new regulation was issued by the DOL and the DOL issued two opinion letters (cited above) interpreting the new regulation and making it clear that employers can deduct from additional compensation for any reason. Thus, Petitioners' cited case law is not persuasive authority, and the Eleventh Circuit's decision did not create a split in authority.

There is likewise no merit in Petitioners' suggestion that § 541.604(a), the DOL's opinion letters, and the *Lovelady* and *Phillips* cases only allow deductions from "fringe benefits" or "discretionary bonuses." Nothing in § 541.604(a), the opinion letters, or the case law

recognizes such a distinction. As discussed above, the DOL does not prohibit any deductions from additional compensation, regardless of whether that compensation is based on hours worked or something else. In short, the DOL's restrictions on deductions from salary do not extend to additional compensation provided to exempt employees, regardless of the form of the additional compensation.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents request that the Petition be denied.

Respectfully submitted,

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